



June 9, 2011

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David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

**Re: Swap Data Recordkeeping and Reporting: Pre-Enactment and
Transition Swaps (RIN No. 3038-AD48)**

Dear Mr. Stawick:

The Electric Trade Associations¹ submit these comments in response to the Notice of Proposed Rulemaking ("NOPR")² issued by the Commodity Futures Trading Commission (the "Commission") seeking comment on its recordkeeping and reporting proposals under Sections 723 and 729 of the Dodd-Frank Wall Street Reform and

¹ The associations include the Electric Power Supply Association, the Edison Electric Institute, the National Rural Electric Cooperative Association, the American Public Power Association, and the Large Public Power Council (together, the "Associations"). The Associations' members include power generators and shareholder-owned, government-owned and cooperative electric utilities that use electric energy and related "swaps" to manage the commercial risks inherent in their core business activities. The comments contained in this filing represent the position of the Associations, but not necessarily the views of any particular member with respect to any issue. The Electric Trade Associations are authorized to note the involvement and support of these comments and recommendations from the Transmission Access Policy Study Group (an association of transmission-dependent electric utilities located in more than 30 states), ACES Power Marketing and The Energy Authority.

² 76 Fed. Reg. 22,833 (Apr. 25, 2011) (the "Historical Swap NOPR").

Consumer Protection Act (the "Dodd-Frank Act").³ More specifically, the Commission is proposing rules concerning data reporting and recordkeeping for: (1) swaps entered into before Dodd-Frank Act enactment (July 21, 2010), where the terms of such swaps had not expired as of July 21, 2010 ("Pre-Enactment Swaps"); and (2) swaps entered into on or after July 21, 2010 and prior to the compliance date(s) the Commission will establish in the permanent rules adopted in the rulemaking "Recordkeeping and Reporting of Swap Transaction Data" RIN No. 3038-AD19⁴ ("Transition Swaps") (together the "Historical Swap Data").

The Associations respectfully ask the Commission to recognize the burdens being imposed on non-financial entities⁵ such as their members, whose core business is to supply and deliver electric energy in the United States. As Congress and Chairman Gensler have recognized, such entities are not interconnected financial entities that expose the financial system to systemic risk.⁶ Consequently, the Commission should impose regulations on non-financial entities only as necessary to achieve Congressional intent under the Dodd-Frank Act. The Commission is respectfully requested not to impose unnecessary regulatory costs and burdens that will impair the ability of non-financial entities to have access to the swaps they need to cost-effectively hedge commercial risk, and not to require non-financial entities to comply with all the new rules contemplated for financial institutions, swap dealers ("SDs"), major swap participants ("MSPs") and other financial entities.⁷

For purposes of the present NOPR, the Commission can achieve its regulatory objectives without burdening the Associations' members by imposing recordkeeping and reporting requirements for Historical Swap Data that:

- Create a safe harbor for non-financial entities while the Commission finalizes its rules and non-financial entities in different industries implement systems to comply with the new rules;

³ 7 U.S.C. §§ 2(h) and 6r.

⁴ 75 Fed. Reg. 76,473 (Dec. 8, 2010) (the "Permanent Reporting NOPR").

⁵ Because "non-SD/MSP counterparty" can include certain financial entities, the Associations use the term "non-financial entities" to mean non-SD/MSP counterparties that are not financial entities.

⁶ Opening Statement of Chairman Gary Gensler, at December 1, 2010 Open Commission Meeting.

⁷ The Commission has acknowledged that the Dodd-Frank Act does not require or authorize the issuance of its interim reporting rule for Transition Swaps, as distinguished from Pre-Enactment Swaps, instead asserting that its authority to require broad record retention for Transition Swaps is "implicit" in the fact that the Commission is generally authorized to institute reporting requirements with respect to transition swaps. *CFTC Interim Final Rule for Reporting Post-Enactment Swap Transactions*, 75 Fed. Reg. 78,892, at 78,893 (Dec. 17, 2010). The lack of statutory authority for adopting the interim rules on recordkeeping and reporting for Transition Swaps applies equally to the proposals in this NOPR. Thus, notwithstanding their comments, the Associations reserve the right to challenge the rules adopted here in respect of Transition Swaps on all procedural and substantive grounds, if appropriate clarifications and safe harbors are not promptly forthcoming.

- Limit unnecessary data collection by and from non-financial entities like the Associations' members, particularly in instances where the agency has not yet determined how or whether it will be using the data to achieve the purposes of the Dodd-Frank Act;
- Allow non-financial entities to rely on data in their current business records for reporting and recordkeeping purposes for historical swaps;
- Establish reporting data elements for historical swaps that accommodate the varied nature of the standardized and non-standardized swaps the Associations' members use as part of their core business activities without imposing burdensome new recordkeeping and reporting obligations;
- Impose recordkeeping and reporting obligations on those swap counterparties best equipped to handle them, and only for non-cleared swaps that have not previously been reported to a trade repository that accepts swaps in the applicable asset class, or that have not been executed on an entity that registers as an SEF for such asset class; and
- Phase in the compliance dates for reporting by asset class, by product type and by SD/MSP/financial entities before requiring reporting by non-financial entities.

I. Safe Harbor

By this NOPR, the Commission is establishing compliance obligations for reporting counterparties for historical swaps. For example, the proposed rules appear to impose an immediately effective recordkeeping requirement as of April 25, 2011 – the day this NOPR was published in the Federal Register.⁸ Reporting counterparties will face complex and perhaps insurmountable challenges complying with this rule for no other reason than that the Commission has not adopted final rules that define what transactions the Commission will regulate as swaps, who will be an SD, MSP or other type of registered entity, and how two non-financial entities who are counterparties to a

⁸ Historical Swap NOPR at 22,838 ("The proposed rule calls for the initial data report for historical swaps in existence as of or after publication of this proposed rule...").

historical swap are to determine in hindsight which is the reporting counterparty for that historical swap.⁹

The Associations appreciate that the Commission is attempting to roll out rules in an orderly fashion and understands that the agency needs to take time to review the record before it adopts rules. However, in the meantime, the Commission should avoid announcing recordkeeping obligations without context and purporting to expose non-financial entities to compliance risk due to the non-final nature of the agency's proposals. The Commission also should avoid suggesting that non-financial entities must incur substantial and likely unnecessary recordkeeping costs before the non-financial entity can possibly know which transactions actually are regulated and reportable swaps.

For these reasons, the Commission should adopt a safe harbor in its rules that provides that non-financial entities will have met their compliance obligations by: (1) collecting and retaining Historical Swap Data in the format and containing such data elements that they have routinely captured prior to the enactment of the Dodd-Frank Act; and (2) complying with any mandatory reporting requirements by using such data regardless of whether all of the data requested by the Commission in its final rules is actually reported and without requiring non-financial entities to prepare or augment the reports by gathering reportable data from paper records.¹⁰ The safe harbor should remain in effect until the date on which the Commission has completed all of the following:

- Issued final rules on product and entity definitions;
- Established the reporting and recordkeeping requirements, including any data dictionaries and input formats for all reportable elements;

⁹ The Commission announced the proposed entity definitions at its December 1, 2010 open meeting. See *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant."* 75 Fed. Reg. 80,174 (Dec. 21, 2010). In the product definitions rulemaking, the Commission does not propose a definition of what electric transactions will be swaps. Instead, the agency asks for further input on what transactions may or may not be swaps. See, e.g., *Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 76 Fed. Reg. 29,818, at 29,832 and 29,839 (May 23, 2011) (Question 35 seeking comment on full requirements contracts, capacity contracts, reserve sharing agreements, tolling agreements, energy management agreements, and ancillary services and stating that the agency is not addressing FTRs or other transactions in RTOs or ISOs within this joint definitional rulemaking).

¹⁰ The Associations are concerned about the growing number of obligations that non-financial entities are facing under the Commission's proposed implementation of the Dodd-Frank Act. One fundamental concern raised by the recordkeeping and reporting initiatives is that non-financial entities could be required to cull through a high volume of paper records to identify reportable data and then prepare electronic reports of such data. The cost burdens associated with such a requirement would far exceed those included in the Paperwork Reduction Act analysis accompanying this NOPR and would not contribute in any material way to achieving Congress's goals under the Act or to the Commission's ability to oversee the swap markets. Thus, the Commission should be diligent in avoiding rules that impose such burdens.

- Registered SDs and MSPs to clarify reporting hierarchy responsibilities;
- Ensured that all reporting counterparties (SDs, MSPs and non-SD/MSP counterparties including non-financial entities) can secure all required uniform identifiers needed for reporting;
- Finalized phased filing deadlines for swap execution facilities ("SEFs"), designated contract markets ("DCMs"), derivatives clearing organizations ("DCOs") and reporting counterparties that are SDs and MSPs;
- Confirmed that a swap data repository ("SDR") is registered and capable of collecting Historical Swap Data that conforms with the data dictionary and Commission-approved product definitions for the asset class to which the particular Pre-Enactment or Transition Swap belongs;
- Acted on all requests for interpretive guidance, exclusion and exemption requests and Section 722 waivers concerning energy-related "swaps";¹¹
- Confirmed that the relevant SDR is capable of providing the Commission (and other regulators with jurisdiction over all or some transactions or swap counterparties) with access to such Historical Swap Data, while restricting access to the non-financial entities' private or commercially-sensitive data in accordance with the Dodd-Frank Act; and
- Allowed adequate time for non-financial entities in different commercial industries to acquire the personnel and systems necessary to comply with reporting requirements.

The Commission can grant the safe harbor without increasing systemic risk. For example, the Commission can still secure specific data as needed (e.g., by data request or subpoena in the case of an enforcement action) even if Historical Swap Data reporting is incomplete or delayed. The number of swaps between non-financial entities also is miniscule relative to the number of swaps in all asset classes in the global markets, most all of which involve more systemically important counterparties. Consequently, the safe harbor will not materially interfere with the Commission's oversight function of the global swap markets, and will ensure that the Commission is not imposing unnecessary costs on non-financial entities.

¹¹ We continue to footnote this term in that we have yet to comment on the Commission's recently proposed rules in respect of Product Definitions, *Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 76 Fed. Reg. 29,818 (May 23, 2011) (the "Definitions NOPR"), and the meaning of the term "swap" is still not clear with respect to the transactions in which the Electric Trade Associations' members engage in the normal course of their everyday activities. The Electric Trade Associations intend to provide comments on the Product Definitions NOPR once they and their members have had an opportunity to review it and evaluate how its provisions will affect the electric industry.

II. Recordkeeping Requirements

Under the proposed rules, counterparties would be required to retain records on a set of minimum primary economic terms for historical swaps that existed on or after the date of publication of rules proposed in this NOPR (April 25, 2011).¹² A swap counterparty also would be required to keep a confirmation of the swap if it had or has the confirmation in its possession on or after April 25, 2011.¹³ For historical swaps that existed on or after July 21, 2010 but had expired or been terminated prior to April 25, 2011, a counterparty would only have to keep records relating to the terms of the swap that the counterparty possessed when the interim rule applicable to that swap (whether a Pre-Enactment or Transition Swap) was published (*i.e.*, October 14, 2010 or December 17, 2010),¹⁴ in whatever format the counterparty kept that information at the relevant time.¹⁵

The Associations support adopting an approach for implementing recordkeeping requirements for non-financial entities whereby they will be required to report only Historical Swap Data they maintain electronically in the normal course of business or, if applicable, in their "trade capture systems." Such Historical Swap Data would include only the basic information as to commodity, price, counterparty, term, swap product type and quantity. The Associations are also amenable to having to retain confirmations as of April 25, 2011, but only if a confirmation was or is created or retained in the normal course of business by the non-financial entity.¹⁶ Thus, the data retention requirement for non-financial entities for each reportable historical swap would cover only the Master Agreement, amendments, confirmations and credit support documents (if any) to the extent they were applicable to such historical swap and the data in Appendix A for Other Commodities, subject to the safe harbor provisions requested above.¹⁷

The Commission asks whether all counterparties to historical swaps will possess the asset class-specific information called for by the proposed rule as part of their normal business practices.¹⁸ While the Associations believe that all or most counterparties to

¹² Historical Swap NOPR at 22,836.

¹³ *Id.* at 22,837.

¹⁴ See *CFTC Interim Final Rule for Reporting Pre-Enactment Swap Transactions*, 75 Fed. Reg. 63,080 (Oct. 14, 2010); *CFTC Interim Final Rule for Reporting Post-Enactment Swap Transactions*, 75 Fed. Reg. 78,892 (Dec. 17, 2010).

¹⁵ Historical Swap NOPR at 22,837.

¹⁶ The Associations do not read the Historical Swap NOPR as requiring non-financial entities to actually confirm any Pre-Enactment or Transition Swap in order to create a record for Dodd-Frank Act compliance purposes. If the Commission is imposing such a requirement, it must do so only prospectively and after providing clear definitions, along with proper notice and comment.

¹⁷ For example, there would be no duty to retain the history of amendments to a Master Agreement that did not apply to the reportable swap (*i.e.*, an amendment that was in place only from 2002-2003).

¹⁸ Historical Swap NOPR at 22,837.

historical "Other Commodity" swaps will collect and retain in their business records data comparable to the data elements identified in the NOPR Appendix, they cannot be certain – hence the Associations' request for a safe harbor. The Associations believe it is very likely that some non-financial entities in the energy sector (particularly the smaller entities) will not have all of the requested Historical Swap Data. The Associations also do not believe that their members will all collect and retain the requested data in an electronic reporting format that is easily adaptable to the Commission's final rules establishing a data reporting taxonomy for historical swaps.¹⁹

III. Reporting Timeframe

The Commission proposes that the reporting obligation for all Historical Swap Data would start on a single "compliance date" that the Commission establishes in the "Recordkeeping and Reporting of Swap Transaction Data" rulemaking (the "Permanent Reporting Date"), thus causing all reporting obligations for all swap asset classes and market participants to be on the same compliance schedule.²⁰ The Associations believe that this "big bang" compliance date may be unrealistic. The Commission should not delay reporting on some more risky asset classes until all asset classes are ready to report. The Associations request that the Commission recognize the need to phase in the reporting rules (both for historical swaps and for post-compliance date swaps) by asset class and by reporting entity type, with reporting requirement compliance dates for non-financial entities becoming effective after the compliance dates for SDs, MSPs and other non-SD/MSP counterparties.²¹

As the Commission has acknowledged, data retention policies are not uniform. Moreover, market participants vary in their automated systems – in terms of deployment, system architecture and IT personnel. Reporting for each asset class will need to be coordinated with the particular SDR(s) accepting data for swaps in that particular asset class. All reporting counterparties will need to make system changes and deploy personnel in order to incorporate identifiers and other reportable data

¹⁹ The non-financial entities may have more Historical Swap Data, and the ability to report more Historical Swap Data in the NOPR Appendix fields electronically, for certain standardized swaps. But they will have much less for non-standardized swaps and, in particular, for those non-standardized swaps to which two non-financial entities are counterparties. The non-standardized transactions are like the proverbial square pegs, whose terms do not fit neatly into the NOPR Appendix's round holes and may not lend themselves to reporting in the electronic manner contemplated by the NOPR.

²⁰ Historical Swap NOPR at 22,837.

²¹ For example, the Commission has sought comment on phasing in the permanent recordkeeping and reporting requirements. See Permanent Reporting NOPR at 76,579-580. The Associations supported implementation phased in by asset class and thereafter by reporting entity type and by standardized vs. non-standardized reportable swap data. See, e.g., Comments of the National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council on Notice of Proposed Rulemaking on Swap Data Recordkeeping and Reporting Requirements, at 16-19 (submitted Feb. 7, 2011); see also Comments of Working Group of Commercial Energy Firms on Recordkeeping and Reporting of Swap Transaction Data, at 4-8 (submitted Feb. 7, 2011).

elements.²² Indeed, non-financial entities like energy companies have commented in one form or another that they cannot uniformly say that they capture all the data requested, they do not have technology in place to collect or report the requested data or to meet the deadlines, they do not electronically verify all swaps, and they do not have the personnel necessary to meet the proposed requirements.²³ In addition, swaps between non-financial entities will require manual intervention and more time to be reported.

In order for non-financial entities to report historical swaps, such reporting will require substantial implementation and ongoing compliance costs without a material beneficial contribution to the goals of the Dodd-Frank Act. For these reasons, the Associations have advocated that the proposed permanent reporting deadlines are too short for swaps between non-financial entities, that non-financial entities should have more reasonable deadlines to report both initial data and swap continuation "state" data, and that the reporting deadlines for non-financial entities should be phased in after those applicable to DCMs, DCOs, SEFs SDs, MSPs and other non-SD/MSP counterparties.²⁴

In answer to the question in this NOPR on the time needed to prepare the reporting systems prior to the specified compliance date,²⁵ the Associations believe that the same concerns summarized above in response to the permanent reporting and recordkeeping rules apply to the recordkeeping and reporting rules contemplated here for Pre-Enactment and Transition Swaps. Thus, the deadlines adopted in this proceeding must be phased in by asset class as one or more SDRs are identified as prepared to accept swap data, and for non-financial entities so they have time to implement changes to their practices and infrastructure and can do so without raising energy costs for consumers (*i.e.*, at least 6-12 months after all the conditions precedent are in place).

IV. Data to be Reported

A. Historical Swaps In Existence As Of Or After April 25, 2011

For each Pre-Enactment and Transition Swap in existence as of or after April 25, 2011, the proposed rule would require the reporting party to submit: (1) "initial data" on the Permanent Reporting Date; and (2) if such a historical swap has not expired or been terminated as of the Permanent Reporting Date, "continuation data," in the form of

²² Historical Swap NOPR at 22,837-38.

²³ See, *e.g.*, Comments of EPSA and EEI on Recordkeeping and Reporting of Swap Transaction Data, at 6 (submitted Feb. 7, 2011).

²⁴ See, *e.g.*, Comments of National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council on Notice of Proposed Rulemaking on Swap Data Recordkeeping and Reporting Requirements, at 18-21 (submitted Feb. 7, 2011); Comments of EPSA and EEI on Recordkeeping and Reporting of Swap Transaction Data, at 6-7 (submitted Feb. 7, 2011).

²⁵ Historical Swap NOPR at n.41.

"state" reports during the remaining term of each historical swap.²⁶ According to the NOPR, the initial data reportable for historical swaps in existence as of or after April 25, 2011 would include the primary economic terms for a Pre-Enactment or Transition Swap specified in the tables in the NOPR Appendix and, if there is a confirmation, the confirmation terms.²⁷ The agency invites commenting parties to reach a consensus and make recommendations on the data to be reported for each asset class.²⁸

As the Associations and their members have indicated in their other comments, the definitions in the Permanent Reporting NOPR Appendix may not apply to all "swaps" especially non-standardized transactions, and may not reflect the data that non-financial entities routinely collect in respect of their energy transactions that may be determined to be "swaps."²⁹ Nonetheless, the Associations have reached a consensus that the following data elements should be available to be reported by a majority of their members for each standardized transaction that is expected to be a historical swap, insofar as the element is applicable to a particular swap:

- Commodity;
- Notional Quantity;
- Contract Type/Product (fixed-for-floating, float-for-floating, swaptions on both);³⁰
- Start and End Dates;
- Fixed Price;

²⁶ Historical Swap NOPR at 22,837.

²⁷ *Id.* at 22,838.

²⁸ *Id.* at 22,837.

²⁹ See, e.g., National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council on Notice of Proposed Rulemaking on Swap Data Recordkeeping and Reporting Requirements, at 16-19 (submitted Feb. 7, 2011). The Associations acknowledge that the Commission has modified the fields in the NOPR Appendix for Other Commodities as compared to those proposed in the Permanent Reporting NOPR. However, as stated previously, the broad variety of standardized and non-standardized commercial transactions that could be considered "swaps" indicates it may be difficult to create an appendix that captures all the Master Agreement or transactional data elements associated with such "swaps."

³⁰ For purposes of this rulemaking, the Associations are commenting on the reportable data elements. The content to be reported in each data element field is subject to the other Commission rulemakings. For example, the Associations already have objected to treating options on physical commodities as swaps. See the Joint Association Comments filed April 4, 2011 in response to *Commodity Options and Agricultural Swaps*, 76 Fed. Reg. 6095 (Feb. 3, 2011). Those objections apply to any rule adopted in this proceeding requiring reporting counterparties to report options (see, e.g., Historical Swap NOPR at 22,847, Comment for "Contract type" for "Other Commodity" swaps). The Associations will provide the Commission with comments on what products are jurisdictional swaps in the Definitions NOPR.

- Underlying Product and Index/Pricing Point (two products if it is float-for-float);
- Counterparty.³¹

The Appendix also refers to "Any other primary economic term(s) of the swap matched by the counterparties in verifying the swap."³² In addition to being vague, this proposal appears to be a data field that would allow a reporting counterparty to provide free-form descriptions. The Associations emphasize that this is not a viable data element that can be reported electronically or that would provide useful standardized information for transparency purposes. For example, in the interest of efficiency and standardization, it seems unlikely that SDRs would want extensive text submissions about non-standardized transaction terms. Instead, the Commission could require the reporting counterparty to respond to a new "yes/no" data element identifying "BESPOKE" swaps to indicate that the swap includes non-standardized terms.

The Associations expect that all or most counterparties to historical "Other Commodity" swaps will possess data that will correlate to the fields in the NOPR Appendix, as the fields there are equivalent to the terms identified in our earlier comments. The Associations note, however, that not all terms will apply to all "Other Commodity" swaps (e.g., grade). Additionally, the Associations expect it will be difficult for some of their members to extract reportable data elements from their current records for purposes of reporting to an SDR or the Commission. As is obvious from the different words used in the Associations' earlier comments as compared to the NOPR Appendix, different market participants use different language to describe similar concepts in their transactions. Even within the same non-financial entity's records, different categories of transactions (or, for example, different subsidiaries' swaps) may be recorded in different systems or otherwise in a manner that makes it difficult to assemble, validate, consolidate and conform records for standardized Commission reporting purposes.³³

Finally, the Commission should clarify that all reported Historical Swap Data will be kept confidential, and used solely for Commission's regulatory purposes under its new

³¹ As used in the above list, floating means the variable price that one party pays (e.g., the PJM West Hub price that PJM publishes). It is an index because it is a weighted average of many PJM LMP nodes. Each node is a pricing point. A swap will either use an index or a single pricing point. For example, someone might pay a fixed price in exchange for the other's promise to pay the price at the other party's generator node. That generator node is a pricing point. Continuing with the PJM example, the underlying product is physical power. Notional quantity is the amount swapped in each hour (e.g., 25 or 50 MW are standard amounts for many power swaps). Note also that the notional quantity can itself be a variable quantity. For example, a "load-following" swap could be for the amount of actual load of a wholesale customer in each hour. A load-serving entity might be able to get an SD to accept a fixed price in exchange for the SD's promise to pay the price (which will typically be an index, usually a zonal price) that the load has to pay for all of its load as it changes in every hour.

³² Historical Swap NOPR at 22,847.

³³ For example, non-financial entities may have Historical Swap Data that they have kept for other accounting, regulatory or business purposes, but the form and descriptions may vary from the Commission's proposed approach not only for a particular asset class but even across reporting entities where there is no pre-existing mandatory nomenclature or format.

jurisdiction under the Act. In no case should the Commission share the Historical Swap Data it collects pursuant to the rules adopted in this NOPR with any index publisher or other market participant, or with other regulators unless a non-financial entity (which may not be subject to the jurisdiction of such other regulator) is given an opportunity to seek a protective order to maintain its rights to protect private and commercially sensitive information.

B. *Historical Swaps In Existence As Of Enactment But Expired/Terminated Before April 25, 2011*

For historical swaps that existed on or after July 21, 2010 but expired or were terminated prior to April 25, 2011, the NOPR would require the reporting counterparty to report initial data covering the terms of the transaction in that counterparty's possession as of the issuance of the relevant Commission interim rules and in the format used by the counterparty.³⁴ The Commission has not explained why collecting this data from non-financial entities will help it achieve the goals of the Dodd-Frank Act and there is no other apparent reason why such data are needed.³⁵ Thus, the Associations urge the Commission to adopt final rules waiving this reporting requirement for swaps between non-financial entities.

³⁴ Historical Swap NOPR at 22,839.

³⁵ The Associations acknowledge the Commission's stated rationale in the Historical Swap NOPR. For example, the Commission says:

Data concerning preenactment swaps and transition swaps will assist achievement of the systemic risk mitigation, market transparency, and market supervision purposes for which the Dodd-Frank Act was enacted. Such data will be needed to give regulators the complete picture of the swap market which the comprehensive regulatory framework and reporting requirements of the statute are designed to provide. Data concerning historical swaps also is necessary for the Commission to prepare the semi-annual reports it is required to provide to Congress regarding the swap market.

Historical Swap NOPR at 22,837. However, the incremental value of the Historical Swap Data for non-financial entities would be negligible. The volume of these transactions will be a small fraction of the volume of the swaps in all asset classes globally to be reported by SDRs, DCOs, SEFs, SDs, MSPs and other financial entities. Consequently, there is little chance that the Commission's ability to oversee the market or prepare Congressional reports would be materially impaired if it decided not to require reporting in the limited circumstance when a non-financial entity would be the reporting counterparty. Further, the Commission has not explained what use it would make of the data. The Commission could simply request the particular data it needs at a later date, if such uses were identified. Finally, the Commission needs to justify imposing substantial recordkeeping and reporting costs on non-financial entities for Pre-Enactment or Transition Swaps. See *Paperwork Reduction Act*, 44 U.S.C. § 3506(b)(1)(A) (directing federal agencies to reduce information collection burdens on the public).

C. Continuation Data

For historical "Other Commodity" swaps, reporting counterparties must report continuation data for so long as the swap remains in effect after the compliance date.³⁶ In explaining its desire to minimize the reporting burden, the Commission says that such obligation is limited to reporting the continuation data available to the reporting counterparty on the compliance date.³⁷ The Associations support minimizing the reporting burden and agree that, in those circumstances when the non-financial entity is the reporting counterparty, the non-financial entity should only be required to report in its post-compliance date state reports the data elements it has collected on historical swaps prior to the compliance date.

The proposed rules get more murky when the Commission goes on to say that this data "may consist of only the data elements contained in the table of minimum primary economic terms for various swap asset classes, as set forth in Appendix 1 to part 46, if that is all that was available to the non-SD/MSP reporting counterparty on that date."³⁸ The Associations urge the Commission to clarify that non-financial entities that do not capture some or all of the data in the NOPR Appendix for a Pre-Enactment or Transition Swap would still meet their post-compliance date reporting obligation by reporting the data in their possession. In other words, there is no duty to modify systems or practices as of some time prior to the compliance date in order to report Historical Swap Data for every field in the NOPR Appendix. Unless and until the recordkeeping and reporting rules are final and compliance is required of non-financial entities, non-financial entities should not have to guess at what interim changes to procedures or systems might be assumed or required by the Commission.

For energy commodity transactions, the proposed regulations would require counterparties to report state data through the remaining life of the historical swap.³⁹ The Associations oppose this proposal as it is unduly burdensome and does not provide any relevant information to the Commission. Non-financial entities should not have to submit these daily updates because their transactions comprise only a minor part of the global swaps market. Instead, non-financial entities should be permitted to provide a snapshot of all reportable and available Historical Swap Data for energy commodity swaps on a quarterly basis.

³⁶ Historical Swap NOPR at 22,838.

³⁷ *Id.* at 22,839.

³⁸ *Id.*

³⁹ *Id.*

D. *Identifiers*

As part of the initial data reporting obligation for historical swaps, the agency would require a reporting counterparty to provide its Unique Counterparty Identifiers ("UCIs").⁴⁰ The Associations support the Commission's proposal that MSPs and SDs, when they are the reporting counterparty, must provide their own UCIs and the reporting counterparty's internal system identifiers for the transaction and non-reporting counterparty, as well as any identifier used by the reporting counterparty's systems to identify the master agreement governing a Pre-Enactment or Transition Swap.

The Associations also are conceptually comfortable with the proposal that non-reporting counterparties would have an additional 180-days after the Permanent Reporting Date for the particular asset class, and only after an SDR has been registered as accepting the relevant asset class of swaps, before they would be required to obtain and use a UCI for their Pre-Enactment and Transition Swaps.⁴¹ However, for a non-financial entity counterparty that has Historical Swap Data for a non-financial-entity-to-non-financial-entity swap, it may not be clear *which* counterparty is the reporting counterparty. The Commission should not require non-financial entities to comply with the UCI requirement on the same compliance timetable applicable to SDs and MSPs as reporting counterparties. The Commission should clarify that this requirement would come into effect only after the phased Permanent Reporting Date(s) applicable to non-financial entities. The requirement also would be conditioned on the non-financial entities having been allowed time for the development and implementation of the requisite systems and procedures to input and report such an identifier by the deadline.

Finally, the Commission seeks input on whether identifying an individual swap transaction with a master agreement or a swap portfolio would allow the agency to determine a counterparty's net exposure by looking at individual swaps that may be subject to close-out netting and other provisions common in portfolio compression.⁴² The data gathered pursuant to this NOPR could give the Commission more information about the overall relationship between the pair of counterparties to a swap. It is not at all clear, however, that a master agreement identifier would permit the Commission to perform its own net exposure calculations.

As the Electric Trade Associations have commented before, master agreements are customized relationship documents negotiated between each set of counterparties based on standardized forms. Master agreements allow counterparties to calculate net exposures in a variety of ways, and at various intervals, depending on the netting and credit support terms (if any) of the master agreement and the types of transactions executed pursuant to it. A single master agreement may allow netting of physical and

⁴⁰ Historical Swap NOPR at 22,838.

⁴¹ *Id.*

⁴² *Id.*

financial transactions, multiple commodity transactions and, in some cases, netting or setoff of exposures outstanding between the counterparties under other agreements and arrangements. The master agreement may provide for such net exposure calculations to be performed daily, weekly, monthly or annually, and for collateral (or "margin") transfer to occur only if specified collateralization thresholds, minimum transfer and rounding amounts have been applied. The Commission cannot simply assume that all master agreements contain identical terms or cover just swaps or just one asset class of swaps.

E. *Inter-Affiliate Transactions*

The Associations respectfully request that the Commission clarify that there is no duty to report Historical Swap Data where both counterparties to a historical swap are affiliates under common control of the same ultimate parent entity or the same common owners, or are members of a "Related NFP EEU Group,"⁴³ and both counterparties, and the common parent if applicable, are non-financial entities. Such transactions are normally executed to facilitate internal accounting and risk management treatment within affiliated groups or to facilitate accomplishing shared public service goals of the not-for-profit government-owned utilities or electric cooperatives, and would provide no information that is material to the Commission's ability to oversee the swap markets.

V. *Selection of Reporting Counterparty*

The Commission proposes to follow the Dodd-Frank Act's hierarchy to decide who should be the reporting counterparty for Pre-Enactment or Transition Swaps – namely that SDs "outrank" MSPs, who "outrank" non-financial entities.⁴⁴ Where both counterparties are the same rank, the proposed rule would require the counterparties to agree, as a term of a swap transaction, which counterparty would fulfill the reporting obligation, including by renegotiating existing agreements.⁴⁵

The Associations agree with the general proposal of requiring an SD or MSP to be the reporting counterparty in Pre-Enactment or Transition Swaps with non-financial entities. Where both counterparties have the same counterparty status, the Associations further agree that the counterparties should determine which counterparty will meet the reporting obligation for each swap as part of any future contract negotiations. There is no need for a formal Commission process to allocate such responsibilities for swaps entered into after the Dodd-Frank Act rules are finalized. Once the Dodd-Frank Act is

⁴³ This term is defined in the comment letter filed by the National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council in respect of the Notice of Proposed Rulemaking on the End-User Exception to Mandatory Clearing of Swaps, at 18-19 (submitted Feb. 22, 2011) that explains the unique affiliate entities, entity structures and coalitions prevalent in the not-for-profit electric industry.

⁴⁴ Historical Swap NOPR at 22,839.

⁴⁵ *Id.*

implemented, the Associations expect that market participants will make such provisions part of their routine master agreement or swap negotiation process.

The Associations also urge the Commission to provide in its rules that the reporting obligations for non-financial entities would apply only in instances where a Pre-Enactment and Transition Swap is with another non-financial entity and where the swap has not been cleared or reported to a trade repository. The Commission already proposes that reporting counterparties would not have to report if they have reported Historical Swap Data to an existing trade repository that becomes registered as an SDR by the Permanent Reporting Date.⁴⁶ In addition, the Commission should state clearly that if a reportable transaction was cleared by a DCO or executed through an entity that is or becomes a SEF or DCM by the Permanent Reporting Date applicable to the non-financial entities, the DCO, SEF or DCM, and not one of the swap counterparties, should have the reporting obligation for Pre-Enactment or Transition Swaps.

The Commission proposes that where only one counterparty to a swap is a U.S. person, the U.S. person should be the reporting counterparty.⁴⁷ However, the Commission also asks who should have to report where only one counterparty to a Pre-Enactment and Transition Swap is a U.S. person and the non-U.S. entity sits higher in the Dodd-Frank Act reporting hierarchy. For example, for a swap between a non-U.S. SD and a U.S. non-financial entity, should the non-U.S. SD be the reporting counterparty?⁴⁸ The Associations support requiring the SD or MSP, including non-U.S. entities, to report in all instances where the Commission has jurisdiction to impose such a requirement.

Finally, the Associations caution the Commission that it may not be able to order counterparties to renegotiate the terms of Pre-Enactment or Transition Swap agreements to provide that just one of the two counterparties act as the reporting counterparty, due to a fundamental principle of contract law – modifications generally require consideration. The reporting counterparty to a swap assumes burdens and compliance obligations that could be significant and were likely not priced into a Pre-Enactment or Transition Swap.⁴⁹ A reporting counterparty, thus, may want to be paid by the non-reporting counterparty for assuming such an obligation after-the-fact. The Commission should clarify that there is no duty to renegotiate the existing transaction to provide for additional consideration, and the Commission should therefore structure its

⁴⁶ Historical Swap NOPR at 22,840.

⁴⁷ *Id.* at 22,839.

⁴⁸ *Id.* at 22,840.

⁴⁹ For comparable reasons, the Commission is proposing to impose margin requirements on uncleared swaps only if they are executed after the effective date of the margin regulations. *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 76 Fed. Reg. 23,732, at 23,734 ("The proposal would not apply to swaps executed before the effective date of the final regulation. The Commission believes that the pricing of existing swaps reflects the credit arrangements under which they were executed and that it would be unfair to the parties and disruptive to the markets to require that the new margin rules apply to those positions.").

rules to assume that, for historical swaps where there is no SD or MSP involved, transaction data will be reported either by both counterparties, or by neither.

VI. Conclusion

The Associations support providing the Commission with the information necessary to provide transparency to the global swap markets, particularly with respect to standardized swaps. However, the Commission should implement reporting and recordkeeping rules that work with current practices and that are not unduly burdensome for non-financial entities. Thus, the Associations respectfully urge the Commission to adopt Pre-Enactment and Transition Swap recordkeeping and reporting rules that are consistent with these comments. Please contact us if you have any questions or concerns regarding these comments.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION



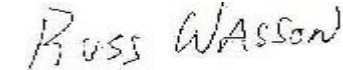
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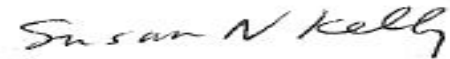
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